STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of K. LOOPER, Minor.

UNPUBLISHED
August 12, 2014

No. 321088
Houghton Circuit Court
Family Division
LC No. 12-000017-NA

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the child at issue, KL, under MCL 712A.19b(3)(b)(*i*) (child's sibling suffered sexual abuse by a parent and reasonable likelihood that child with suffer injury or abuse in the future if placed in parent's home), (i) (parental rights to sibling terminated due to sexual abuse and prior attempts to rehabilitate parent have been unsuccessful), (j) (reasonable likelihood of harm), (k)(*ii*) (parent abused sibling and abuse included criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate), (*l*) (parental rights to child's sibling previously terminated as a result of proceedings under MCL 712A.2(b)), and (n)(*i*) (parent convicted of criminal sexual conduct and continuing parent-child relationship would be harmful). Because the trial court did not abuse its discretion in admitting expert testimony and the trial court did not clearly err in terminating respondent's parental rights, we affirm.

At a plea hearing, respondent admitted that, before KL was born, he had sexually abused KL's half-sibling, NH, which led to the termination of his parental rights to NH. Specifically, respondent acknowledged as true the first two allegations found in the petition in this case, which read as follows:

> 1) [Respondent's] parental rights to another child, [NH], were involuntarily terminated . . . in 2006 as the result of child protective proceedings.
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> 2) The Court found as a matter of law by clear and convincing evidence that [respondent] abused NH and that such abuse included criminal sexual conduct involving penetration, attempted penetration or assault with intent to penetrate. The Court further found by clear and convincing evidence that [respondent], the child's father was convicted of a violation of MCL 750.520e, and that the victim of said criminal act was [NH] and that further it was in the best interest of the minor child to terminate parental rights between the child and her father because

> continuing the parent-child relationship with the parent would be harmful to the child.[1]

As a result of respondent's plea, the trial court assumed jurisdiction over KL.

Thereafter, at the initial dispositional hearing, petitioner presented testimony from psychologist Michael Varney, who was qualified as an expert witness without objection from respondent. Varney examined respondent with the stated goal of determining the likelihood that respondent would "re-offend," that is, sexually abuse KL as he had NH. For this purpose, Varney interviewed respondent and later administered what he described as a standard battery of tests, including the "Millon Clinical Multiaxial Inventory-III (MCMI-III)," a "Sexual Adjustment Inventory-(SAI)," an "Anger Management Profile-(AMP)," and a "Substance Abuse Questionnaire." The tests involved numerous questions, the answers to which determined respondent's "risk" for certain behaviors, such as sexual assault and violence.

Varney testified that his interview with defendant was the "most important" aspect of his examination. He testified that psychologists generally look to three factors to determine whether a sex-offender is likely to re-offend: whether the previous sexual assaults were repeated, the offender's "insight" into the effects on the victim, and whether the offender abuses substances. Varney testified that, despite abusing NH repeatedly, respondent possessed little insight into the effects that his sexual abuse had on NH. Varney explained that respondent minimized the abuse by characterizing it simply as a "mistake," and that respondent focused on how he had been affected by the events. Finally, Varney testified that respondent admitted that he was an alcoholic and that he continued to drink. Based on his interview and testing, Varney testified there was a high likelihood that respondent would reoffend.

In addition to Varney's testimony, the trial court also heard testimony from the child protective services worker on the case, KL's mother, and respondent. Respondent, while disagreeing that he was likely to re-offend, acknowledged that he has substance abuse issues, that he continues to drink (though he had plans to stop), and that he would not have abused NH if he had not been drinking. KL's mother confirmed respondent's continued alcohol use.

Following the hearing, the trial court terminated respondent's parental rights. In doing so, the trial court took judicial notice of the fact that, in the previous case, NH testified that the sexual abuse occurred repeatedly and involved penetration. Further, the trial court explained that the previous case file evidenced the fact that attempts to rehabilitate respondent had proved unsuccessful. The trial court also credited Varney's assessment as evidence that respondent had not benefited from attempts at rehabilitation. Based on the evidence presented, the trial court concluded that respondent posed a great risk of reoffending, meaning there was a reasonable likelihood that KL would suffer injury or abuse in the foreseeable future if placed in

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[1] Respondent initially questioned the reference to a finding of "penetration, attempted penetration or assault with intent to penetrate." However, it was explained to respondent that the allegation was that the court found that "one or more" of these, not necessarily all of them, happened. At that time, defendant acknowledged the allegation as "true."

respondent's care. After finding several statutory grounds for termination had been satisfied, the trial court also determined that termination would be in KL's best interests. Consequently, the trial court terminated respondent's parental rights.

On appeal, respondent now challenges the termination of his parental rights. In particular, respondent first argues that the trial court erred in relying on Varney's opinions because the tests he administered merely profiled respondent by comparing him to other sex-offenders. Relying on *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007), respondent asserts that such tests lacked sufficient probative value to be relied upon by the court in making its decision.

A trial court's determination that statutory grounds for termination have been established by clear and convincing evidence is reviewed for clear error. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). A finding is clearly erroneous if, on the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id*. In contrast, the trial court's decision to admit evidence is reviewed for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). An abuse of discretion occurs when the trial court selects an outcome outside the range of reasonable and principled outcomes. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009).

In challenging the admission of Varney's testimony, respondent relies exclusively on *Dobek*, 274 Mich App at 95-96, for the proposition that "sex offender profiling is not sufficiently reliable, nor is the supporting data sufficient, to allow for admission." Unlike the present case, *Dobek* was a criminal case in which the defendant was accused of criminal sexual conduct perpetrated against his stepdaughter. *Id.* at 62. The defendant sought to present an expert in psychology, Dr. Andrew Barclay, who would have testified "that defendant did not exhibit characteristics or fit the profile of a typical sex offender as determined by psychological testing and interviews." *Id*. at 92. The trial court precluded the admission of the evidence. *Id*. On appeal, this Court affirmed, explaining:

> There are many aspects of Barclay's testimony that are problematic. Barclay stated that the sex-offender profiles developed from the testing are useful and can indicate a predisposition, but they cannot establish with any degree of certainty that a person is or is not a sex offender. Barclay acknowledged that none of the literature presented endorsed using the test results in a court of law to assist in the determining whether someone is a sex offender on the basis of that person's psychological profile. Barclay also conceded that there are numerous articles that indicate that the tests should not be used to create a sex-offender profile. Indeed, there is controversy in the psychological community about using psychological testing to identify sex offenders. Barclay's testimony further reflected that the research is ongoing in this area, as opposed to being firmly established. [*Id*. at 96 (emphasis in original).]

Respondent's reliance on *Dobek* is misplaced. First, unlike in *Dobek*, where the prosecutor opposed admission of the evidence before the trial court, respondent did not challenge the admission of the evidence he now contests. Instead, at the hearing, respondent affirmatively stated that he had "no objection to [Varney's] qualifications." In addition, with the exception of

a request that the report be kept confidential, respondent neither objected to Varney's testimony nor the admission of Varney's report. By failing to challenge Varney's expert opinion in the trial court, respondent waived his claim of error in this regard. See *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004) ("[A] party may waive any claim of error [under MRE 702] by failing to call this gatekeeping obligation to the court's attention . . . .").[2]

Second, unlike in *Dobek*, the proffered expert testimony in this case did not relate to whether respondent had committed an act of criminal sexual conduct. That is, while *Dobek* found unreliable the use of sex offender profiling, it did so in the context of prohibiting an expert from implicitly opining on the question of whether the defendant was a sex offender, see *Dobek*, 274 Mich App at 98, and it does not stand as a categorical bar to the use of sex offender profiling in every circumstance. Varney, for example, did not administer tests as a means of assessing respondent's guilt. Instead, respondent openly acknowledged that he had molested NH and the issue remaining was whether respondent was likely to reoffend. Indicators of respondent's predisposition, while not reliable evidence of his past guilt, may well provide reliable and useful information in the assessment of whether he is likely to reoffend in the future. Cf. *id.* (noting expert testified that "the sex-offender profiles developed from the testing are useful and can indicate a predisposition, but they cannot establish with any degree of certainty that a person is or is not a sex offender"). In this regard, unlike in *Dobek*, Varney testified that the SAI is widely used in his field to determine the likelihood that a previously adjudged sexual offender will re-offend. He noted that it is in fact "required by the federal pre-trial and the federal courts" in cases involving sex offenders. In short, unlike in *Dobek*, there is evidence that the tests in this case are reliable means of assessing that which they sought to measure, namely respondent's likelihood of reoffending.

Moreover, also unlike *Dobek*, Varney testified that he did not base his conclusions principally on the tests, but rather on his interview of respondent, meaning that, in addition to test results, Varney had insight to provide into respondent's behavior and personality, including, for example, the apparent lack of insight respondent demonstrated into the harm his abuse caused NH. Overall, on these facts, particularly given the lack of objection from respondent, the trial court did not abuse its discretion in admitting Varney's testimony.

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[2] Indeed, although respondent raises general arguments regarding the reliability of Varney's expert testimony, he did not argue in the trial court, and he does not argue on appeal, that Varney's opinion was inadmissible under the rules of evidence. See generally MRE 702. Instead, respondent states in his brief that "the rules of evidence did not apply," and he thus appears to operate, as did the trial court, under the misapprehension that the rules of evidence did not govern the termination hearing. Contrary to respondent's framing of the issue, MCR 3.977(E) provides that when termination is sought at the initial disposition, as it was in this case, the statutory grounds for termination must be established by legally admissible evidence. *In re Utrera*, 281 Mich App 1, 17-18; 761 NW2d 253 (2008). Nevertheless, given that respondent failed to object to Varney's qualification as an expert or to his testimony at the hearing, and he has not relied on the rules of evidence in crafting his appellate argument, we conclude that he has waived any argument in this regard. See generally *Craig*, 471 Mich at 82.

We note also that, even if there were some error in the admission of Varney's testimony, respondent has not shown reversal is required. In child protective proceedings, improperly admitted evidence does not require reversal unless there is a demonstration, by the respondent, that substantial justice requires reversal of the order terminating parental rights. *In re Utrera*, 281 Mich App at 21. Respondent has not made such a showing in this case where there is clear and convincing evidence, which he has not contested, to support termination on several grounds. Specifically, by his own admission, respondent had a prior conviction for criminal sexual conduct, and his rights to another child had been terminated for sexual abuse. At his plea hearing, he further conceded that there had been a finding of "penetration, attempted penetration or assault with intent to penetrate," and the trial court took judicial notice of the fact that NH previously testified to repeated instances of penetration. Respondent further acknowledged that alcohol played a role in his abuse of NH, and the evidence showed that he continued to drink alcohol. The trial court also noted that records demonstrated a lack of benefit from the services previously received by respondent. Thus, even apart from Varney's testimony on respondent's test results, there was clear and convincing evidence supporting termination of respondent's rights pursuant to MCL 712A.19b(3)(b)(*i*), (i), (j), (k)(*ii*), (*l*), and (n)(*i*).[3]

On appeal, respondent also challenges the trial court's best interests determination. Specifically, respondent argues that he has a relationship with KL, he has been punished for his abuse of NH, he is remorseful for his actions, and he poses no threat to KL, as evidenced by the fact that KL's mother did not view him as a threat.

After a trial court determines that one or more statutory grounds for termination exist, it must find that termination is in the best interests of the child before a parent's parental rights can be terminated. MCL 712A.19b(5). It is the petitioner's burden to prove, by a preponderance of the evidence, that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 83, 90; 836 NW2d 182 (2013). In deciding whether termination is in the child's best interests, the court must weigh all available evidence. *In re White*, 303 Mich App 701, __; 846 NW2d 61 (2014); slip op at 6. Factors to consider include, the parent's parenting ability, [and] the child's need for permanency, stability, and finality . . . ." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal citations omitted). A parent's history of criminal sexual conduct, particularly against a sibling, is also a relevant consideration. See *In re Hudson*, 294 Mich App 261, 269; 817 NW2d 115 (2011); *In re Jenks*, 281 Mich App 514, 519; 760 NW2d 297 (2008). On appeal, this Court reviews the trial court's best interests determination for clear error. *In re White*, slip op at 6.

In this case, the trial court's determination that termination of respondent's parental rights was in KL's best interests was not clearly erroneous. Respondent admitted his abuse of NH and

[3] Indeed, clear and convincing evidence of any one of these grounds would provide a sufficient basis for termination as "[o]nly one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

had been convicted of criminal sexual conduct for that abuse. He had also failed to address issues which he acknowledged contributed to the sexual abuse, including his alcohol use. Varney's testimony, which the trial court did not abuse its discretion in admitting, confirmed the high likelihood of respondent's reoffending, and in particular the apparent lack of understanding respondent showed in relation to the harm caused by his previous conduct. On these facts, respondent posed a danger to KL's safety and well-being, and thus the trial court did not clearly err in concluding that it was in KL's best interests to terminate respondent's parental rights.

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra